82-56

Docket No.

FILED

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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1982

PEARLIE SIMMONS,
Petitioner

v.

SEA-LAND SERVICES, INC.,
Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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See Inside Covers For Cases Continued

MELVIN BANDY, For and on behalf of himself, individually, and
AMERICAN MUTUAL INSURANCE COMPANY of BOSTON,
Petitioners,

v.

BANK LINE, LTD.,
Respondent.

FRED L. SPRATLEY, For and on behalf of himself, individually and
ATLANTIC & GULF STEVEDORES, INC.,
Petitioners,

v.

HELLENTIC LINES, LTD.,
Respondent.

THOMAS E. McLEAN, and
ATLANTIC & GULF STEVEDORES, INC.,
Petitioners,

v.

CIA TRANSATLANTIC ESPANOLA, S.A.,
Respondent.

CHARLES A. CALDWELL, and
COMMERCIAL UNION INSURANCE COMPANY,
Petitioners,

v.

OGDEN SEA TRANSPORT, INC.,
Respondent.

WALLACE CURRY, and
ATLANTIC AND GULF STEVEDORES, INC.,
Petitioners,

v.

COMPANIA CRASATLANTICA ESPANOLA, S.A.,
Respondent.

WILBERT C. HAROLD, For and on behalf of himself, individually,
and
THE HARTFORD ACCIDENT INDEMNITY INSURANCE COMPANY,

v.

COMPANHIA DE NAVEGACAO MARITIMA NETUMAR,
Respondent.

IN THE
SUPREME COURT OF THE
UNITED STATES

Pearlie Simmons,
Petitioner
v.
Sea-Land Services, Inc.,
Respondent.

Melvin Bandy, for and on behalf of
himself, individually, and
American Mutual Insurance Company of
Boston,
Petitioners,
v.
Bank Line, Ltd.,
Respondent.

Fred L. Spratley, for and on behalf of
himself, individually, and
Atlantic & Gulf Stevedores, Inc.,
Petitioners,
v.
Hellentic Lines, Ltd.,
Respondent.

Thomas E. McLean, and
Atlantic & Gulf Stevedores, Inc.,
Petitioners,
v.
CIA Transatlantic Espanola, S.A.,
Respondent.

Charles A. Caldwell, and
Commercial Union Insurance Company,
Petitioners,
v.
Ogden Sea Transport Inc.,

Respondent.

Wallace Curry, and
Atlantic and Gulf Stevedores, Inc.,
Petitioners
v.
Compania Crasatlantica Espanola, S.A.,
Respondent.

Wilbert C. Harold, for and on behalf of
himself, individually, and
The Hartford Accident Indemnity
Insurance Company,
Petitioners,
v.
Companhia De Navegacao Maritima Netumar,
Respondent.

QUESTIONS PRESENTED

I. Does the mere initiation of payment of compensation by an employer and acceptance of that initial compensation by a longshoreman constitute an "award in a compensation order filed by the deputy commissioner", where the only action by the deputy commissioner has been to file the employer's notice that compensation has been started?

II. Once the statutory assignment of 33 U.S.C. §933(b) has occurred and the employer possesses full control over the claim against the third party, may the employer voluntarily reassign to the longshoreman the right to sue?

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Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on April 12, 1982.

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit in the instant matter is reported as Simmons v. Sea-Land Services Inc., 676 F.2d 106 (4th Cir. 1982), and is reprinted in the Appendix to this petition.

The opinion of the district court in Bandy v. Bank Line Ltd., is reported at 518 F.Supp. 1229 (E.D. Va. 1981), and is reprinted in the Appendix to this petition. The other opinions of the district court in the other consolidated cases herein are not reported, but are reprinted in the Appendix to this petition.

JURISDICTION

The opinion of the Court of Appeals for the Fourth Circuit sought to be reviewed was entered on April 21, 1982 and this petition for certiorari is filed within ninety days of that date.

No petition for rehearing has been filed in the Court of Appeals. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

Federal jurisdiction in the district courts in the instant matters existed pursuant to 28 U.S.C. §1332.

STATUTORY PROVISIONS INVOLVED

33 U.S.C §933(b): Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

STATEMENT OF THE CASE

Each of the instant cases involves a longshoreman who was injured on the

job and who initially accepted compensation without contravention by the respective employer. Disputes later arose as to the entitlement of some of the longshoremen to additional compensation benefits. Each longshoreman later brought an action against an allegedly negligent shipowner. In each case the district court concluded that the plaintiff had received "an award in a compensation order" more than six months prior to the institution of his suit, and that pursuant to 33 U.S.C. §933(b), the plaintiff no longer retained the right to sue the shipowner. The district court entered summary judgment in favor of the defendant in each case.

Each longshoreman filed his action more than six months after compensation payments were initiated. As the Court of Appeals noted, however, the pattern

of payments varied from case to case. Longshoremen Bandy, Caldwell, Curry, and Harrold, filed their actions more than six months after receiving their last compensation payments; none of them ever received a formal award. Longshoreman Simmons filed his action while receiving payments, though the payments had once been interrupted when he attempted to return to work; he did not receive a formal award. Longshoreman McLean filed his action while receiving compensation payments, but after the filing date he received a formal award of permanent total disability. Longshoreman Spratley filed his action while receiving payments and within six months of a formal order of permanent total disability. 676 F.2d at 109, n.3.

The Court of Appeals for the Fourth Circuit concluded that an award in a compensation order does not require

formal entry of an award in an order. Instead, the Court decided that an "informal award" would be sufficient to trigger the assignment provision of Section 33(b), relying upon the Fourth Circuit's prior decision in Liberty Mutual Insurance Company v. Ameta & Company, 564 F.2d 1097 (4th Cir. 1977). Thus, the Court of Appeals held that "an award in a compensation order" is created by the completion of three events:

> "(1) The employer, having not contravened its liability, initiates compensation payments to the longshoreman; (2) the deputy commissioner files the employer's notice that compensation payments have been initiated; and (3) the longshoreman accepts any of the payments." 676 F.2d at 109.

In addition, the Court of Appeals held that once the statutory assignment took effect, the employer could not

voluntarily reassign to the longshoreman the right to sue the third party. The Court of Appeals therefore affirmed the district court judgments against each of the instant longshoreman.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.

This Court recently decided in Rodriguez v. Compass Shipping Co., Ltd., 68 L.Ed. 2d 472 (1981), that Congress provided that a longshoreman loses all right to proceed against a negligent third party unless the longshoreman files suit within six months of acceptance of compensation "in an award in a compensation order filed by the Deputy Commissioner." In Rodriguez, this Court did not have before it and did not decide what constituted an award in a compensation order. In fact, this Court's grant of certiorari in Rodriguez

specifically did not extend to consideration of that question, though the petitioners in Rodriguez had sought such review. For the purposes of its decision, the Rodriguez court assumed that there had been awards so as to trigger the assignment provision of §33(b) of the Longshoremen's Act. Id. at 477, n.3. Thus, the Supreme Court opinion in Rodriguez is not useful in resolving the question of what is an award. Theodore v. Moore McCormack Lines Inc., 516 F.Supp. 25 (S.D. N.Y. 1981).

For purposes of its Rodriguez decision, this Court assumed that acceptance of compensation as made by the Rodriguez petitioners operated as an assignment. The petitioners in Rodriguez had accepted compensation in settlements of compensation claims, which were embodied in settlement

agreements signed by the plaintiff, his attorney, the employer's representative, and the Labor Department's claims examiner. See Rodriguez Court of Appeals Opinion, 617 F.2d 955, 957 (2d Cir. 1980). The Court of Appeals for the Second Circuit had held in Rodriguez that "an agreement settling an injured employee's claim to workmen's compensation signed after an informal conference with a claims examiner, by whom it was approved, constitutes an "award" within the meaning of §33(b)." Id. at 959. This definition of "award" was not disturbed by the Supreme Court on certiorari.

The result of the Second Circuit's rule was that longshoremen had at least the opportunity to consider the full compensation they would be receiving from their employers and to realize the full extent of the limited compensation

recovery before the six month period of limitation began to run. Such longshoremen would have received a copy of the settlement agreement and would know that their rights to compensation had been terminated. Any decision to sue a third party then could be made with full knowledge of all the rights and limitations afforded by the compensation remedy.

A review of the various provisions of §33(b) since the original enactment of the Longshoremen's Act in 1927 shows that Congress had a specific intention when it wrote the language contained in that section. Originally that section provided that acceptance of compensation worked an automatic assignment of the right to sue a third party. Congress amended this section in 1938 to provide that acceptance of compensation "under an award in a compensation order filed

by the Deputy Commissioner" worked an assignment of a longshoreman's right to sue. Finally, in 1959 Congress added the language that acceptance of such compensation in an award in a compensation order filed by the Deputy Commissioner operated as an assignment unless the longshoreman filed suit within six months after such award.

Cases decided under the 1938 version of the Act clearly established that mere acceptance of compensation was insufficient to effect an assignment of the longshoreman's right to sue. The rule was clear that there had to be an actual "award in a compensation order filed by the Deputy Commissioner". The United States Supreme Court held in American Stevedore Inc. v. Porello, 330 U.S. 446 (1946) that acceptance of compensation without an award does not operate as an assignment of the

employee's right to sue a negligent third party. Numerous lower court decisions concluded that unless there was compliance with the statutory language--an actual award in an actual compensation order actually filed by the Deputy Commissioner--there was no assignment of the right to sue. See Grasso v. Lorentzen, 56 F.Supp. 51 (S.D. N.Y. 1944), aff'd. 149 F.2d 127 (2d Cir. 1945), cert. denied, 326 U.S. 743; Tartaglia v. Cunard White Star Ltd., 56 F.Supp. 55 (S.D. N.Y. 1944); Brusich v. Grace Line Inc., 56 F.Supp. 48 (S.D. N.Y. 1944); Iaria v. Silver Line Ltd., 56 F.Supp. 42 (S.D. N.Y. 1943); Cupo v. Isthmian Steamship Company Inc., 56 F.Supp. 45 (S.D. N.Y. 1941); Roeben v. United States, 113 F.Supp. 732 (D. N.J. 1953).

The Court of Appeals for the Fourth Circuit in Simmons has

dramatically rewritten the definition of "award in a compensation order." In its Simmons opinion the Fourth Circuit has held that an award in a compensation order is created by the completion of three events. All that is necessary to create an award is that the employer initiate compensation payments to the longshoreman, the deputy commissioner file the employer's notice that compensation payments have been initiated, and the longshoreman accept any of the compensation payments.

The Fourth Circuit has focused solely on the word "award" and has completely ignored the phrase "in a compensation order." In creating its concept of "informal award," the Fourth Circuit has overlooked the additional requirement that there be a "compensation order." It seems indeed that the Fourth Circuit has called

Congress back into session "to cancel half a Line." Director, OWCP v. Rasmussen, 440 U.S. 29, 47 (1979).

The Longshoremen's Act establishes a workmen's compensation scheme based upon payment of compensation by the employer voluntarily and without an award. The Act provides in Section 14(a) "compensation under this Act shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer." 33 U.S.C. §914(a). The Act further provides in Section 14(c) that upon making the first payment of compensation, the employer shall immediately notify the deputy commissioner, in accordance with a form prescribed by the Secretary, that payment of compensation has begun. 33 U.S.C. §914(c). The form prescribed by

the Secretary when notifying the deputy commissioner is Form LS-206, Payment of Compensation Without Award. Yet the Fourth Circuit has focused on the filing of this very form (Payment of Compensation Without Award) to create a compensation award. The Fourth Circuit focuses on mere acceptance of compensation by the longshoreman as a pivotal event in determining when there has been "an award in a compensation order" although the payment has been made "without an award." In the logic of the Fourth Circuit, "payment of compensation without award" becomes "an award in a compensation order." The plain language of the statute has been turned inside out. Such a construction is surely incongruous and inappropriate for a statute which is to be construed in favor of injured employee and so as

to avoid harsh and incongruous results. Voris v. Eikel, 346 U.S. 328 (1953).

In American Stevedores v. Porello, supra., this Court concluded that mere acceptance of compensation benefits did not preclude an employee from suit against the third party. Instead, the Court recognized:

> "The apparent purpose of the Act is to provide payments during the period while the employee is unable to earn, when they are sorely needed, without compelling him to give up his right to sue a third party when he is least fit to make a judgment of election. For these reasons we think that mere acceptance of compensation payments does not preclude an injured employee from thereafter electing to sue a third party tortfeasor." 330 U.S. at 456.

The result of the Fourth Circuit's Simmons holding however does operate to cut off a longshoreman's right to sue

during a time he is unable to earn, when compensation benefits are sorely needed. Under Simmons, the statute of limitations for longshoremen becomes six months from the first compensation payment. Since the first compensation payment is ordinarily made within two weeks after the injury, longshoremen in the Fourth Circuit have a six month plus two weeks statute of limitations.

The results are dramatically different in the Second Circuit geographical area. In that Circuit, until there is a signed settlement agreement between the employer and the longshoreman, with approval from the Labor Department, there is no award. Rodriguez, 617 F.2d at 959.

In Verderame v. Torm Lines, 670 F.2d 5 (2d Cir. 1982), the Second Circuit had before it a longshoreman who was injured in June, 1975. He received

interim compensation payments, described as Payment of Compensation without Award, from then until January, 1977, when he filed a third party suit. He received compensation payments until August, 1978. At that time, the longshoreman and the employer entered into a settlement agreement, embodied in a Labor Department compensation order, requiring payment of an additional sum in settlement of the compensation claim. The Second Circuit held that until the amount of compensation benefits to be recovered by the injured longshoreman is fixed, either by order, stipulation of the parties, or informal award, there cannot be an "acceptance of compensation under an award in a compensation order" within the meaning of Section 33(b) of the Act. Id. at 7. Accordingly, since the longshoreman in Verderame brought suit prior to the settlement of his

compensation claim, the Court of Appeals reversed the district court's dismissal of his third party suit. In the Fourth Circuit however, plaintiff Verderame would have been barred from suit six months after his compensation payments began in June, 1975.

The Second Circuit followed similar reasoning in D'Amico v. Cia. de Nav. Mar. Netumar, 677 F.2d 249 (2d Cir. 1982). There, D'Amico was injured in December, 1974. He received interim compensation payments from his employer until September, 1975. The longshoreman and the employer then began settlement discussions, which culminated in a payment made by the employer in December, 1975. The Labor Department inquired of the longshoreman whether he was dissatisfied with the settlement, but he never responded. A formal order approving settlement was never entered

by the Labor Department. A third party suit was filed by the longshoreman in August, 1977. The district court dismissed the suit for being brought more than six months after the December, 1975 settlement payment. The Second Circuit reversed the dismissal on the grounds that further development of the facts was necessary to establish an approved settlement agreement which could be construed as an award. In the Fourth Circuit however, plaintiff D'Amico would have been barred from suit six months after his compensation payments began in December, 1974.

The significant difference between the period within which a longshoreman may sue in the Second Circuit and the far briefer period he may sue in the Fourth Circuit is indefensible. A federal statute requires a uniform national interpretation. Yet in the

Second Circuit, longshoremen can sue third parties even though the longshoremen have received interim compensation payments, until there is an approved compensation settlement. However in the Fourth Circuit, longshoremen cannot sue more than six months after acceptance of their very first compensation payment. In the Second Circuit each of the petitioners here before this Court would retain his right to sue; in the Fourth Circuit none retained that right. There is, of course, no statutory language which would support the different interpretation of the Longshoremen's Act in Norfolk, Baltimore, or Charleston from that in New York City. All American longshoremen should have an equal opportunity to prosecute third party claims. Review by this Court is

necessary to provide a uniform national interpretation.

This petition presents a question of federal law which should be, but has not been, settled by this Court. Already a split of authority exists between the Second Circuit and the Fourth Circuit. In addition, the District Court for the District of Columbia has rejected the Fourth Circuit view and declined to hold that mere acceptance of compensation benefits by an injured employee, without approval of a settlement by the Labor Department, constitutes and award in a compensation order. Collier v. John Mendis Inc., 526 F.Supp. 459 (D. D.C. 1981); Fearson v. Johns-Manville Sales Corporation, 525 F.Supp. 671 (D. D.C. 1981). The district court in the Eastern District of Pennsylvania also declines to find an award in a compensation order upon mere

receipt of compensation and notice to the Labor Department that compensation has been started. Klitznsky v. Pakistan Shipping Corporation, 530 F.Supp. 326 (E.D. Pa. 1981); Dunbar v. Retla Steamship Co., 484 F.Supp. 1308 (E.D. Pa. 1980). There too the Fourth Circuit view has been rejected. Also, the district court for the Western District of Washington has refused to consider mere acceptance of compensation sufficient to constitute an award. Sea Quest Marine Inc. v. Cove Shipping Inc., 474 F.Supp. 166 (W.D. Wash. 1979). The Supreme Court should settle the question once and for all of what constitutes "an award in a compensation order filed by the deputy commissioner."

The Fourth Circuit's Simmons ruling is founded upon the Fourth Circuit's earlier ruling in Liberty Mutual Insurance v. Ameta & Co., supra.

While the Fourth Circuit has extended Liberty Mutual even further in its Simmons holding, this Court should recognize that the Liberty Mutual rationale has been severely criticized by other courts. See Fearson, supra, Collier, supra; Klitznsky, supra, Dunbar, supra; DeMonte v. Shipping Corporation of India, 476 F.Supp. 392 (S.D. N.Y. 1979); Sea Quest Marine, supra; and the district court opinion in Rodriguez, 456 F.Supp. 1014 (S.D. N.Y. 1978). This Court should exercise its power of certiorari to bring the Fourth Circuit back from its aberrant interpretation of the assignment provision of the Longshoremen's Act.

II

The Fourth Circuit Court of Appeals also ruled that after a statutory assignment, the employer may not voluntarily reassign to the

longshoreman the right to pursue the third party claim. The Fourth Circuit had previously ruled that such voluntary reassignment by the employer was permissible. Caldwell v. Ogden Sea Transport Inc., 618 F.2d 1037 (4th Cir. 1980). However in view of criticism of Caldwell contained in this Court's Rodriguez opinion, the Fourth Circuit in Simmons determined that voluntary reassignments were not permissible. This Court's Rodriguez opinion does not preclude voluntary assignments from the employer to the longshoreman. That question was simply not presented to the Court in Rodriguez and therefore was not answered by Rodriguez. In fact, Rodriguez contains language which supports an employer's right to revest in the longshoreman the right to sue. This Court wrote that "when the §33(b) assignment occurs, it transfers the

employee's entire right to commence a third party action to the employer," 68 L.Ed. 2d at 479, and "the legislative history indicates that once the 6-month period expires, the employer possesses complete control of the 3d-party claims." Id. at 484. If the employer as statutory assignee possesses complete control, he must be able to voluntarily revest the right to sue in the injured worker. Otherwise, by definition, the employer's control is less than complete.

Permitting voluntary reassignment by the employer is also in keeping with prior practice under the Longshoremen's Act. Johnson v. Sword Line, 146 F.Supp. 1940 (E.D. Pa. 1956); aff'd. 257 F.2d 541, 544-46 (3d Cir. 1958); The Owen, 43 F.Supp. 897 (E.D. Pa. 1942); Magee v. McNany, 10 F.R.D. 5 (W.D. Pa. 1950).

Accordingly, since this Court did not preclude voluntary reassignment in its Rodriguez opinion and since prior practice in the Third Circuit and in the Caldwell opinion in the Fourth Circuit permitted voluntary reassignment, the Court of Appeals for the Fourth Circuit erred in holding that voluntary reassignment was impermissible.

CONCLUSION

For the reasons set forth herein, because the Court of Appeals for the Fourth Circuit has created a definition of "award in a compensation order filed by the deputy commissioner" which is markedly inconsistent with the definition of award approved by the Second Circuit in Rodriguez, because the Fourth Circuit definition of award is inconsistent with the statutory language and with the intent of Congress, and because the Fourth Circuit has

misinterpreted this Court's Rodriguez opinion, petitioners herein pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Fourth Circuit entered April 12, 1982.

Respectfully submitted:
John H. Klein,
Ralph Rabinowitz,
Counsel for Petitioners.

CERTIFICATE OF SERVICE

I John H. Klein certify that on July 12th, 1982, 40 copies of this Petition for Certiorari were mailed or delivered to the Clerk, United States Supreme Court and three copies were mailed to:

John B. King, Jr., counsel for Ogden Sea Transport, Inc., Companhia de Navegacao Maritima Netumar, Compania Crasatlantica Espanola, S.A, 2050 Virginia National Bank Bldg., One Commercial Place, Norfolk, Virginia 23510;

Carter B.S. Furr, counsel for Nakliyati, & Hellenic Lines, Ltd., P.O. Box 1039, Norfolk, VA 23501;
and

John R. Crumpler, Jr., counsel for Bank Line and Sea-Land Services, P.O. Box 119, Norfolk, VA 23501.

John H. Klein

APPENDIX

Appeals from the United States District Court for the Eastern District of Virginia, at Norfolk, John A. MacKenzie, Chief District Judge, and J. Calvitt Clarke, Jr., District Judge.

Argued: January 7, 1982
Decided: April 12, 1982

Before WIDENER, HALL and CHAPMAN, Circuit Judges.

HALL, Circuit Judge:

These consolidated appeals involve common issues of law regarding a longshoreman's right to sue third parties pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, et seq. For the reasons expressed herein, we affirm the decision of the district court.

Each of the cases involves a longshoreman who was injured on the job and who accepted compensation benefits without contravention by their employers. Each longshoreman later brought an action against an allegedly negligent shipowner pursuant to 33

U.S.C. § 905(b). In each case the district court concluded that the plaintiff had received "an award in a compensation order" more than six months prior to the institution of his action, and that pursuant to 33 U.S.C. §933(b) the plaintiff no longer retained the right to sue the shipowner.[1] As to plaintiffs Bandy, Caldwell and Hart, the court additionally ruled that certain purported reassignments of the claims executed by their employers were invalid because the LHWCA did not expressly sanction reassignments. Based on these

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[1] The district court reached this conclusion in an earlier opinion concerning one of the appellants, Bandy v. Bank Line, Ltd., 442 F.Supp. 882 (E.D. Va. 1977). That decision was affirmed on appeal as to the claims of appellants Bandy, Caldwell, Harold and Curry. Caldwell v. Ogden Sea Transp., Inc., 618 F.2d 1037 (4th Cir. 1980). In its opinions in the current cases, the district court relied upon our affirmance of its earlier decision.

rulings, the court entered summary judgment in favor of the defendants.

Two principal issues emerge from these rulings. First, we must identify the event or events which create "an award in a compensation order" sufficient to trigger the six-month period set forth in Section 933(b). Second, we must determine whether an assignee who has acquired the claim upon expiration of the six-month period may reassign that claim to the injured longshoreman.

I.

> 33 U.S.C. §§ 933(a) and (b) provide:
>
> (a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation

> or to recover damages against such third person.
>
> (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or [the Benefits Review] Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

Under these subsections, a longshoreman who accepts "compensation under an award in a compensation order" has six months to bring an action against the third party, and the failure to do so operates as an assignment of the claim to the employer or its subrogee. 33 U.S.C. §933(h). Thus, the critical phrase for purposes of the assignment is "an award in a compensation order."

In Liberty Mutual Insurance Co. v. Ameta & Co., 564 F.2d 1097 (4th Cir.

1977), we stated "that an award under a compensation order does not require formal entry of an award per se." 564 F.2d at 1102. In Ameta, an injured longshoreman accepted compensation payments without a formal order and the deputy commissioner received, accepted and filed certain supporting documents pertaining to the longshoreman's claim. Without delineating minimum requirements, we held that these supporting documents represented sufficient affirmative action and a determination by the deputy commissioner " so as to constitute an 'award' of benefits in a compensation order under 77 U.S.C. §933(b)." Id. at 1103. Although Ameta involved an action between the employer's insurance carrier and the third party shipowner, this Court subsequently extended the Ameta interpretation of "award" to a

straightforward longshoreman versus shipowner lawsuit in Caldwell v. Ogden Sea Transp., Inc., 618 F.2d 1037 (4th Cir. 1980).[2]

Having determined that Section 933(b) contemplates an informal award, we next turn to the requisites of such an award. As revealed by the facts of these cases, a number of events may occur during the disability period which could be interpreted as the culmination of an informal award.[3] However, as we stated

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[2]As a preliminary argument, the appellants argue us to limit Ameta to its facts. This argument is foreclosed by Caldwell.

[3]All appellants filed their actions more than six months after compensation payments were initiated; however, the pattern of payments varies from case to case. Bandy, Caldwell, Curry and Harold filed their actions more than six months after receiving their last compensation payment; none of these claimants ever received a formal award. Simmons filed his action while receiving payments, but the payments had once been interrupted when he attempted to return to work; he also did not receive a formal award. Hart received payments from July 27,

in Ameta, the essence of an award is "an act of ratification of compensation, whether formal or informal, and the subsequent acceptance by the claimant," 564 F.2d at 1102. In addition, the award must serve the dual purpose of protection the welfare and rights of the longshoreman while not unduly delaying the employer's access to relief from the negligent third party.

With these concepts in mind, we hold that "an award in a compensation order" is created by the completion of three events: (1) the employer, having not contravened its liability, initiates

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1978 until September 3, 1979, and then received a lump sum payment in a formal order dated October 26, 1979; he filed his action more than six months later in July, 1980. McLean filed his action while receiving payments, but subsequent to the filing date received a formal award of permanent total disability. Spratley filed his action while receiving payments and within six months of a formal order of permanent total disability.

compensation payments to the longshoreman; (2) the deputy commissioner files the employer's notice that compensation payments have been initiated; and (3) the longshoreman accepts any of the payments.[4] Such an award triggers the six-month period without regard to subsequent suspensions in payment or formal awards of benefits. We believe that this rule will foster the prompt payment of benefits by eliminating the need for perfunctory contravention by the employer, and will provide the employer with access to its remedies within a reasonable time. As in all such cases, the six-month period will protect the longshoreman by giving him an opportunity to investigate and weigh his options.

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[4] In accord with our decision in Larson v. Associated Container Transp. (Australia) Ltd., 459 F.Supp. 561 (E.D. Va. 1978).

II.

The LHWCA contains no provision for the actual, voluntary reassignment of a claim once the six-month period expires and the claim has vested in the assignee. In Caldwell v. Ogden Sea Transp., Inc., 618 F.2d 1037 (4th Cir. 1980), we ruled that such assignments were proper. However, certain aspects of Caldwell were subsequently criticized and rejected by the Supreme Court in Rodriguez v. Compass Shipping Co., Ltd., 101 S.Ct. 1945 (1981). Accordingly, our analysis must center upon the validity of Caldwell-type reassignments in the aftermath of Rodriguez.

Caldwell sanctioned both voluntary and involuntary reassignments subsequent to the expiration of the six-month period. A voluntary or actual reassignment simply required the statutory assignee to reassign the claim

to the injured longshoreman. To obtain an involuntary reassignment, the longshoreman could compel the assignee to either sue the third party or reassign the claim. In support of these rulings, we relied upon Congress' intent that third parties be held to liability and the absence of conflict with the LHWCA.

The Caldwell rationale was sharply criticized in Rodriguez. After reviewing the LHWCA, its amendments and the problems which arose in its administration, the Supreme Court concluded that "once the 6-month period expires, the employer possesses complete control of third party claims." 101 S.Ct. at 1954. With this principle as its touchstone, the Court rejected the Caldwell rule that a longshoreman could compel the assignee to either sue or assign the action.

Although Rodriguez limited its discussion to the longshoreman's residual or concurrent rights in the post-assignment period, the Court strenuously emphasized "[t]he comprehensive character of the procedures outlined in the Act...." 101 S.Ct. at 1956. In light of the admonition to refrain from "fashioning...an entirely new set of remedies," id., we are constrained to rule that the purported assignments were invalid as a matter of law because they fall outside the purview of the LHWCA.

Accordingly, the judgment entered by the district court in each of these cases is affirmed.

A F F I R M E D.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

MELVIN BANDY,
Plaintiff,
v. C/A No. 77-716-N
BANK LINE, LTD.,
Defendant.

AMENDED OPINION AND ORDER

This matter comes before the Court on the defendant's Motion for Summary Judgment filed on May 22, 1981. The plaintiff, a longshoreman, has filed a suit seeking damages for injuries suffered while working aboard a vessel owned and operated by the defendant. The injuries allegedly were caused by the negligence of the defendant. On November 29, 1977, the defendant filed a Motion for Summary Judgment contending that the workmen's compensation benefits received by the plaintiff under the Longshoremen's and Harbor Workers' Compensation Act ("the Act"), 33 U.S.C. §901 et seq., had terminated prior to

the six months before the institution of the suit, thus extinguishing the plaintiff's right to bring suit. The plaintiff has admitted that the instant suit was filed after this six-month period had expired.

In an Opinion and Order dated December 30, 1977, addressing the issue raised by the defendant's motion, we held that plaintiff's failure to file suit within six months of the termination of his statutorily required compensation benefits resulted in a statutory assignment from the plaintiff to his employer of the exclusive right to proceed against the vessel owner pursuant to section 33(b) of the Act, 33 U.S.C. §933(b) (1976)[1] despite the fact

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[1]The statute provides in pertinent part:

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as

that no formal award had been made to the plaintiff. Bandy v. Bank Line Ltd., 442 F.Supp. 882, 883-84 (E.D. Va. 1977).[2] We also emphasized, however, that under Czaplicki v. The Hoegh

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an assignment of the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

33 U.S.C. §933(b) (1976).

[2]Our ruling that the lack of a formal award did not preclude the operation of the statute was based on the unequivocal mandate found in Liberty Mutual Insurance Co. v. Ameta & Co., 564 F.2d 1097, 1103 (4th Cir. 1977). In Ameta, as in the majority of similar cases, the suit was initiated not by the employer, but by the compensation insurance carrier. Section 33(h) of the Act provides that when "the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section." 33 U.S.C. § 33(h) 1976. Accordingly, the eventual assignee of the right to sue following the expiration of the six-month period available to the employee under the Act may be either the employer or the employer's compensation carrier.

Silvercloud, 351 U.S. 525 (1956), proof of an established conflict between the interests of the assignee employer and the interests of the employee coupled with the inaction of the employer would result in a retention by the employee of the right to sue the vessel owner beyond the six-month period allowed by the Act. Bandy v. Bank Line Ltd., 442 F.Supp. at 886.[3] See also McClendon v. Charente Steamship Co., 348 F.2d 298 (5th Cir. 1965). Accordingly, we denied the defendant's Motion for Summary Judgment to permit the plaintiff to develop

[3] In Czaplicki v. The Hoegh Silvercloud, 351 U.S. 525, 531 (1976), the Supreme Court found a conflict of interest because the compensation carrier of the employer was also the insurer of the third party defendant most likely to be held liable and, as such, the injured longshoreman's "rights of action were held by the party most likely to suffer were the rights of action to be successfully enforced." Id. at 530.

evidence, if any existed, demonstrating the existence of a conflict of interest.

On April 7, 1978, the defendant filed a second Motion for Summary Judgment, contending that the plaintiff had not sought any discovery or presented any issues of fact with respect to the conflict of interest. The plaintiff thereafter advised this Court that he had no further evidence to present on this issue. Accordingly, following a review of the file, we found no evidence of a conflict of interest and granted the defendant's Motion for Summary Judgment because, under the statute, the plaintiff's delay in filing suit of more than six months after the termination of his compensation benefits resulted in an exclusive assignment of his right of action to his employer.

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The plaintiff appealed[4] and the United States Court of Appeals for the Fourth Circuit, in a detailed opinion, vacated and remanded the judgment of this Court. Caldwell v. Ogden Sea Transport Inc., 618 F.2d 1037 (4th Cir. 1980). The court specifically affirmed our rulings that an informal award was sufficient to trigger the running of the six-month period and that the assignment of the claim to the employing stevedore after six months was exclusive. Id. at 1041-1043. The court stated, however, that the basis of the conflict of interest exception created by the Supreme Court in Czaplicki was that

> notwithstanding a statutory assignment of the longshoreman's right of action, that right of action may be revested in the longshoreman when it becomes manifest that the

[4]The appeal was consolidated with five other cases addressing the same issue

> assignee, with knowledge of its exclusive right to control and prosecute the claim, nevertheless declines to do so for any reason.

Caldwell v. Ogden Sea Transport, Inc., 618 F.2d at 1046. Based on this reasoning, the court held that the exclusive right of action revests in the longshoreman if two conditions are fulfilled. First, the longshoreman must formally signal to the assignee that he wishes the assignee to prosecute the claim under peril of having the exclusive right of action revert to him. Second, the assignee must formally signal its disinclination to pursue the claim. Id.

The defendant has renewed its Motion for Summary Judgment, relying on the recent Supreme Court decision in Rodriguez v. Compass Shipping Ltd., 49 U.S.L.W. 4527 (May 18, 1981). In

addition, the plaintiff has filed a Supplemental Amended Complaint in which he alleges that American Mutual Insurance Company ("American") has reassigned to the plaintiff the right to proceed against the defendant. In support of this allegation, the plaintiff's counsel has filed his own affidavit, accompanied by a letter, dated June 5, 1981, signed by Mr. Robert Hunter, the District Claim Supervisor for American. The affidavit states that American had made compensation payments to the plaintiff pursuant to the Act. Mr. Hunter's letter states that American has decided "to assign to [the plaintiff], the right to proceed with this third party action."

The issue in Rodriguez was "what, if any, right the longshoreman has against the third-party shipowner if he

does not sue within the six-month period and the employer fails to do so thereafter," Id. at 4528, precisely the issue addressed by the Fourth Circuit in Caldwell. After an exhaustive examination of the legislative history of the Act, preceded by the caveat that "'absent a clearly expressed legislative intention to the contrary, the [statutory] language must ordinarily be regarded as conclusive.'" Id. at 4529 (citation omitted), the Court essentially found that the longshoreman's right to file suit was completely cut off unless he could prove a conflict of interest as delineated by Czaplicki.

Although Caldwell was not before it, the Supreme Court discussed that decision and specifically rejected the Fourth Circuit's judicially created

reassignment of a right of action to the employee when the assignee fails to prosecute the claim.

> The predicate for the Fourth Circuit's analysis was an assumption that Congress did not intend to allow the longshoreman to lose his rights against a third party simply because (a) he failed to take any action within 6 months and (b) his employer decided not to sue the third party thereafter.... We are persuaded that the reason Congress did not specifically provide the solution which the court readily found is that Congress did indeed intend to require the employee either to act promptly or to accept the consequences of an assignment of his claim to the employer. One of the consequences of such an assignment is the risk that the employer will choose not to sue. The comprehensive character of the procedures outlined in the Act precludes the fashioning of an entirely new set of remedies to deal with an aspect of the problem that Congress

> expressly addressed. The fact that parties sometimes fail to assert meritorious claims within the period authorized by law is not a sufficient reason for refusing to enforce an unequivocal statutory bar.

Id. at 4531-32 (footnotes omitted). This language effectively overturns the basis upon which the Fourth Circuit reversed our grant of the defendant's previous Motion for Summary Judgment and clearly indicates that once the exclusive right of action has been assigned to the employer by virtue of the operation of section 33(b) of the Act, it does not revest in the employee simply because the employer fails to pursue the claim. In addition, the Fourth Circuit's affirmance of our ruling that more than six months had elapsed between the award to the plaintiff and the filing of his

Complaint was not disturbed by the Supreme Court in Rodriguez. The Court specifically stated that for purposes of its decision, it was assuming that the acceptance of compensation, even without a formal award, triggered the running of the six-month limitation of the Act, and limited its review of the issue of whether reassignment of the employee occurred upon the employer's failure to prosecute the action. Id. at 4527 n.3. Thus, insofar as the issue of when an award is made triggering the six-month limitation, we are bound by the Fourth Circuit's holdings in Caldwell and Liberty Mutual Insurance Co. v. Ameta & Co., 564 F.2d. 1097 (4th Cir. 1977). Accordingly, American's failure to file suit has not resulted in an automatic reassignment to the plaintiff of this right.

We next address the issue of the effectiveness of the express assignment of the right to sue executed by American and delivered to the plaintiff.[5] The Fourth Circuit in Caldwell viewed an express reassignment as one of the procedural tools for effectuating what is perceived to be the underlying purposes of the Act and of Czaplicki.[6]

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[5]Although we have doubts about the ability of the short letter to act as an effective and binding assignment under general contract law, we assume for the purpose of this opinion that this letter meets the contractual prerequisities of a valid assignment.

[6]The practical and procedural means for realizing these are also readily found. A longshoreman desiring to force decision can of course first proceed extra-judicially to request action by the assignee or, as an alternative, formal reassignment of the right of action. As we indicate in Part IV of this Opinion, a formal reassignment will be effective to revest the exclusive right of action in the longshoreman.

Caldwell v. Ogden Sea Transport, Inc., 618 F.2d 1037, 1046 (4th Cir. 1980) (emphasis supplied).

618 F.2d at 1046. As we have already indicated, the Supreme Court in Rodriguez rejected the underlying basis of the Caldwell decision and disapproved of the Fourth Circuit's fashioning a remedy that the comprehensive character of the procedures outlined in the Act did not specifically provide. Rodriguez v. Compass Shipping Co., 49 U.S.L.W. at 4531-32. Moreover, the Court specifically addressed the issue of a nonstatutory right to a reassignment created by the Fourth Circuit[7] and discussed the procedural mechanism for implementing this right delineated by the Fourth Circuit. The Court, guided

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[7] In an attempt to avoid the conclusion mandated by its plain language, petitioners contend that the Act should be construed...to grant the employee an implicit right to have the third-party claim reassigned if the employer fails to sue.

Rodriguez v. Compass Shipping Co., 49 U.S.L.W. 4527, 4529 (May 18, 1981).

by the concept that when "interpreting the intent of Congress in fashioning various details of this legislative compromise, the wisest course is to adhere closely to what Congress has written." Id. at 4533 (footnote omitted), concluded that there was "no evidence that congress created either the substantive right itself or the procedural rights that the court discerned." Id. at 4531 (emphasis supplied). "The meaning of §33(b) is plain and should be respected." Id. at 4533. Thus, in the absence of a conflict of interest, the Court found that no means (procedural rights) existed by which an assignment of the right to bring suit (substantive right) could be made by the employer or his compensation carrier and that the

employee had no right to receive (substantive right) such an assignment.

Accordingly, we FIND that the assignment from American to the plaintiff is ineffective and does not revest in the plaintiff the right to file suit against the defendant. The language of the Act is plain and unequivocal and does not provide for either the substantive right to receive such an assignment or for the procedure used by the plaintiff. To hold otherwise would constitute an end run around and make a mockery of the clear Congressional mandate that a longshoreman file his suit within six months of the receipt of an award. Absent a conflict of interest, an employer or compensation carrier who had failed to pursue the cause of action, either because it had been dilatory or

because it believed that the action was so weak that it did not wish to risk the costs of litigation, certainly would assign that right to the employee in the hope that the employee would initiate the action.[8] If, for example, the

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[8]The Caldwell court noted three reasons for the assignee's failure to file suit following a statutory assignment under section 33 of the Act:

> It may not consider a claim thought meritorious by the longshoreman to be sufficiently so to warrant the expense of litigation. It may have a specific conflict of interest that militates against prosecuting the claim. It may simply be dilatory to the point that the claim is threatened by a limitations bar.

Caldwell v. Ogden Sea Transport, Inc., 618 F.2d 1037, 1045 (4th Cir. 1980). In the second situation, the employer or his compensation carrier certainly would refuse to assign the right of action. The longshoreman, however, should be able to file suit under the Czaplicki exception and no express written assignment would be required. In the first and third situations, the employer or compensation carrier would have no reason to prevent another party from

employee brought suit seeking a nuisance settlement, to harass the third-party tortfeasor, or even in the mistaken belief that he had a valid claim, the employer or its compensation carrier, by virtue of its statutory lien, would be the beneficiary, without risk, of any unexpected recovery.

Accordingly, an employer or compensation carrier would be foolish not to expend the insignificant effort required to execute an assignment of the right of action upon a request by the

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filing suit. It would have no interest in the effect of such a suit on the third-party tortfeasor. By failing to file suit, it would have lost its ability to recover the compensation benefits paid to the longshoreman. If an assignment were viewed as effective, the employer or compensation carrier would retain a lien on the longshoreman's recovery, if any, to the extent of any compensation payment made to the longshoreman, see 33 U.S.C. §933(b) (1976); Boomer v. Liberty Mutual Ins. Co., 445 U.S. 74 (1980), and the longshoreman would be able to obtain an assignment simply by requesting one.

longshoreman in every case that it had decided not to pursue and in which no conflict of interest existed. The circumstantial evidence in the instant case supports our conclusion. The assignment here was executed by an officer of American, the compensation carrier, approximately one week after the submission of a request for such an assignment by the plaintiff's attorney. Moreover, the request was submitted on May 28, 1981, only ten days after the Supreme Court decided Rodriguez. The Act and its legislative history, as interpreted by the Rodriguez Court, clearly forbid such a pro forma procedure for reinstating a longshoreman's right to sue a third party once he has lost such a right because of his failure to file suit

within the six-month limit established by the Act.

Conclusion

In sum, we FIND that the exclusive right to the instant cause of action was assigned to the plaintiff's employer under section 33(b) of the Act. Moreover, under Rodriguez, a reassignment of the action can occur only if evidence of a conflict of interest, as delineated in Czaplicki, is present; the simple failure of the employer to prosecute the claim is not enough.[9] The record contains no evidence of a Czaplicki type of conflict. Moreover, the assignment

[9] The notion adopted in some post-Czaplicki decisions that a conflict of interest may be presumed whenever an employer does not sue on an assigned claim is simply untenable in light of the plain statutory language and history of the 1959 and the 1972 Amendments.

Rodriguez v. Compass Shipping Co., 49 U.S.L.W. 4527, 4533 (May 18, 1981).

executed by American and delivered to the plaintiff is ineffective. Accordingly, the defendant's Motion for Summary Judgment is GRANTED and the plaintiff's Complaint is DISMISSED.

I have consulted my fellow judges in this division and they have authorized me to say that they concur with this Opinion.

/ss/
United States
District Judge

July 27, 1981
Norfolk, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

THOMAS E. McLEAN,
Plaintiff,
v. CA No 79-366-N
CIA TRANSATLANTIC ESPANOLA S.A.,
Defendant.

O R D E R

The Court having received no response to its letter of July 28, 1981, this matter is now ripe for action on the defendant's Motion for Summary Judgment. The Motion for Summary Judgment is GRANTED and this action is DISMISSED with prejudice. Bandy v. Bank Line, Ltd., C/A No. 77-716-N (E.D. Va. July 27, 1981) (Amended Opinion and Order).

/ss/
United States District Judge

August 14, 1981
Norfolk, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

PEARLIE SIMMONS,
Plaintiff,
v. C/A No. 80-1181-N
SEA-LAND SERVICES, INC.,
Defendant.

ORDER

The motion of the defendant for summary judgment is GRANTED, see Bandy v. Bank Line Ltd., Clarke, J., July, 7, 1981.

It is so ORDERED.

/ss/
United States District Judge
Norfolk, Virginia
August 12, 1981

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

FRED L. SPRATLEY, and
ATLANTIC & GULF STEVEDORES, INC.,
Plaintiffs,
v. C/A No. 80-1151-N
HELLENIC LINES, LTD.,
Defendant.

O R D E R

The Court is of the opinion that the defendant's Motion for Summary Judgment is now ripe for decision. The motion is GRANTED and this action is DISMISSED with prejudice. Bandy v. Bank Line, Ltd., C/A No. 77-716-N (E.D. Va. July 27, 1981) (Amended Opinion and Order).

/ss/

United States District Judge

Dated August 17, 1981
Norfolk, Virginia

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

CHARLES A. CALDWELL,
Plaintiff,
v. C/A No. 77-317-N
OGDEN SEA TRANSPORT, INC.,
Defendant.

O R D E R

The Court finds the defendant's Motion for Summary Judgment ripe for decision, no response having been received from this Court's letter of July 28, 1981.

The Motion for Summary Judgment is GRANTED and this action is DISMISSED with prejudice. Bandy v. Bank Line, Ltd., C/A No. 77-716-N (E.D. Va. July 27, 1981) (Amended Opinion and Order).

/ss/
U.S. District Judge

August 17, 1981
Norfolk, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

WALLACE CURRY,
Plaintiff,
v. C/A No. 77-720-N
COMPANIA CRASATLANTICA ESPANOLA, S.A.,
Defendant.

O R D E R

The Court having received no response to its letter of July 28, 1981, this matter is now ripe for action on the defendant's Motion for Summary Judgment. The Motion for Summary Judgment is GRANTED and this action is DISMISSED with prejudice. Bandy v. Bank Line, Ltd., C/A No. 77-716-N (E.D. Va. July 27, 1981) (Amended Opinion and Order).

/ss/
United States District Judge

August 17, 1981
Norfolk, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

WILBERT C. HAROLD,
Plaintiff,
v. C/A No. 77-507-N
COMPANHIA DE NAVEGACAO MARITIMA NETUMAR,
Defendant.

O R D E R

The Court having received no response to its letter of July 28, 1981, this matter is now ripe for action on the defendant's Motion for Summary Judgment. The Motion for Summary Judgment is GRANTED and this action is DISMISSED with prejudice. Bandy v. Bank Line, Ltd., C/A No. 77-716-N (E.D. Va. July 27, 1981) (Amended Opinion and Order).

/ss/
United States District Judge

August 17, 1981
Norfolk, Virginia